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NO. 22079

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN LEANDRO PISANI,
a.k.a. JOHN PARENTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL CARUSO

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I

STATUTES UNDER WHICH DEFENDANT IS BEING PROSECUTED

The defendant was convicted of violation of 26 United States Code, Sections 4411 and 7201 on June 12, 1967.

Section 4411 states in pertinent part:

"There shall be imposed a special tax of $50 per year to be paid by each person (who is engaged in the business of accepting wagers) . . . or who is engaged in receiving wagers for or on behalf of any person so liable."

Section 7201 states:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned for not more than 5 years, or both, together with the costs of prosecution."

II

THE AFFIDAVIT OF LOUIS BARISH, MADE A PART OF THE COMPLAINT, IS WHOLLY INCONSISTENT WITH THE MAIN TEXT OF THE COMPLAINT, RESULTING IN NO CRIME BEING CHARGED

The complaint alleges that defendant violated 26 U.S.C. §§ 4411 and 7201, during the period between July 1, 1966, and November 19, 1966; the affidavit of LOUIS BARISH rebuts such a charge, and it is solely upon the affidavit of Louis Barish that the complainant is able to allege any "act" whatsoever upon which to base a criminal complaint.

The affidavit of Louis Barish originally stated that the last wager he "placed with Parenti was 6 or 7 months ago". This obviously takes anything whatsoever Mr. Barish allegedly did with Mr. Parent (sic) outside of the time period charged in the complaint. Six or seven months prior to the date Mr. Barish signed his affidavit on November 18, 1966, identifies a time period in the vicinity of approximately April 18, 1966 to May 18, 1966. The

complaint charges the "crime" was committed between July 1, 1966, and November 19, 1966.

However, the affidavit of Louis Barish was changed to read: "The last wager I placed with Mr. Parent (sic) was 4 to 6 months ago". Once again, if the last wager were placed 5 or 6 months prior to November 18, 1966, the time period would again be outside the scope of the time period charged in the complaint. If, as alleged with such great uncertainty by Mr. Barish, the wager was placed in the 4th month prior to the signing of his affidavit, only 13 of the days of said 4th month (July) fall within the time period charged in the complaint.

Mr. Barish also stated in his affidavit that he placed wagers with either Mr. Parenti or Mr. Farkas. Hence, there nowhere appears a statement that any wager was placed (let alone "received or accepted", as required under the sections Parenti allegedly violated) directly with Parenti during the only time period applicable in Mr. Barish's affidavit -- July 18 through July 31, 1966.

To charge a crime under 26 U. S. C. §4411, the defendant must be "engaged" in the business of "receiving wagers".

That defendant must be "engaged in business of receiving wagers" to violate 18 U. S. C. §4411 see <u>U. S. v. Forys</u> (D. C. R. I., 1953), 113 F. Supp. 580 (Acceptance of a single wager does not make acceptor subject to "occupational" tax imposed upon person who is "engaged in receiving wagers."); <u>Lewis v. U. S.</u> (App. D. C., 1955), 75 S. Ct. 415 (using term "engaging in business").

There is no substantiation in Mr. Barish's affidavit that Parenti was engaged in the business of receiving wagers during the period charged in the complaint.

III

COMPLAINANT HAS NO PERSONAL KNOWLEDGE, NOR BASIS THEREFOR, TO CHARGE DEFENDANT WITH ANY CRIME

That the complaint must be based on the personal knowledge of the complainant, see:

United States v. Langsdale (D. C. Mo., 1953), 115 F. Supp. 489, 491;

Giordenello v. United States (1958), 357 U. S. 408;

United States v. Bosch (D. C. Mich., 1962), 209 F. Supp. 15;

United States v. Greenberg (9th Cir., 1963), 320 F. 2d 467.

In Giordenello, supra, at pp. 486 and 487, the court stated:

> "The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

> "When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matter contained therein; . . . We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer." (Emphasis added).

The requirement of personal knowledge is not changed by the fact that 18 U.S.C. §3045 authorizes commissioners to sign complaints for violations of internal revenue laws. The deficiencies of a complaint failing to show personal knowledge cannot be supplied by reliance by the commissioner upon a presumption that the complaint was made on the personal knowledge of the complaining officer.

Giordenello, supra.

One line of cases goes so far as to hold that a complaint is insufficient if it alleges that the complainant conducted an investigation of the defendant's tax liabilities by examining his tax records, by interviewing third persons with whom the defendant did business, by consulting public and private records relating to defendant's income, and interviewing third persons having

knowledge of the taxpayer's financial condition, as a result of which investigation the complainant had knowledge that the defendant had evaded internal revenue laws -- not sufficient personal knowledge of the complainant. See United States v. Barbanell (D. C. N. Y. 1964), 231 F. Supp. 200.

IV

SUFFICIENCY OF AFFIDAVITS GIVING MAGISTRATE PROBABLE CAUSE TO ISSUE WARRANT

The basic question to be determined here is whether there was sufficient evidence presented before the magistrate, so that he was able to decide for himself that there was probable cause to issue the warrants which he subsequently did.

The determination of probable cause is a function of the magistrate and not of the agents or anyone else.

> "The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."
>
> Johnson v. United States, 333 U. S. 10, 13-14.

This statement hits at the heart of the matter. Agents them-

selves might become so wrapped up in a case that they fail to see the error of their ways. That a man is "innocent till proven guilty" should apply at the initial stages of an action also. Hence it is the magistrate who must decide, and his decision must come only from the information which he has before him. This last point was affirmed in Aguilar v. Texas (1964), 378 U.S. 108, where the court said a reviewing court may pass only on information brought to the magistrate's attention. Facts which may be put forth later cannot justify the issuance of a previous warrant.

> "Here the mere conclusion that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein, it does not even contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge."
>
> Aguilar, page 113.

It is seen that facts must be stated specifically, and that there must be some manner of crediting the statements made. If this is not done, the warrant cannot be issued, since there is lack of probable cause.

This brings us to the issue of underlying circumstances. Perhaps the best case to begin with is People v. Tillman (1965), 47 Cal. Rptr. 614). The court here was applying the Federal standard and concluded that: (1) "The statement of the informer

in the affidavit must be factual in nature rather than conclusionary." (2) "That the informer had personal knowledge of the facts related." (3) "The affidavit must contain some underlying factual information from which the issuing judge can reasonably conclude that the informant whose identity need not be disclosed, was credible or his information reliable." Tillman, page 617.

These ideas were supported in Travis v. United States, 362 F. 2d 477, 479, where it was said that personal knowledge by the affiant is not necessary if the affidavit puts forth (1) the underlying circumstances from which to conclude there is probable cause, and (2) alleges such circumstances that the magistrate can conclude that the informer was credible and the information reliable.

Thus far, it has been shown that the affidavit must state facts, not conclusions; these facts and/or the informer must be credited; and if these are not present, there must be a minimum of, at least, personal knowledge, though this may not suffice by itself. Conclusions are not enough; there must be facts from which the magistrate can draw his own inference.

Applying the above creteria to the instant case, there is good reason to believe that the agent (Stutz) did not comply with this standard. In his own affidavit, there are no factual statements whatsoever. Paragraph 3, concerning the statement of Freedman is conclusionary. It states only that "Mr. Freedman stated that . . . John Parenti was also operating as a bookmaker . . . and accepting wagers." There are no facts to verify this, no underlying

circumstances are shown; there is nothing present in the affidavit crediting Freedman's information or himself (the fact that he was arrested on 30 October, 1966, and then making this statement is certainly not to his benefit in establishing his credibility). Nothing is stated to show that he even had personal knowledge of this information. Hence, a perfect application of the question from _Aguilar_, cited _supra_.

Paragraph 4 of the supporting affidavit consists of information given by a "reliable" informant. In the affidavit, it says that the informer "Stated that John Parenti is currently operating as a bookmaker . . . and that wagers can be placed with Mr. Parenti." Once again, _Aguilar_ may be cited. There is no allegation of personal knowledge; no facts upon which to base this conclusion are present; no underlying circumstances to credit the informer. (The fact of the telephone number in question is not enough to justify the warrant. The affidavit "concludes" that wagers can be placed on this line; it does not cite any occasions that this was done.)

Paragraph 7 does not lend a thing to the underlying circumstances justifying the warrant. It just states that John Parenti has not registered or paid the tax required under §§ 4412 and 4411 respectively. But this assumes the conclusion; there are still no facts, or any acknolwedgement of personal observation, or crediting of any informers. so that a magistrate could conclude from the facts as given, that there was probable cause.

If Agent Stutz had alleged some personal surveillance, or

some verification of the information given, then perhaps it would have been sufficient. In United States v. Ventresca (1965), 380 U. S. 102, the affidavit was upheld, though based on hearsay information of others. The key to that case was that the agent had done some independent investigation, and therefore had knowledge of facts upon which to credit the hearsay testimony. "Based upon observations made by me" prefaced the affidavit.

This is not so in the present case. There is no allegation by Stutz to that effect. Thus, we are, from the government's most favored view, but one step away from probable cause. But that is enough; for without that verification, we return to the defects listed above.

There remains to be considered the affidavit of Louis Barish. Once again, the same problems arise. An exception is that it does seem that Barish is speaking from personal knowledge. Stutz does not make any statement by which to verify these facts. And query:is the uncorroborated statement of what seems to be an accomplice is good enough, by itself, for a magistrate to conclude that probable cause is present.? The government, in its Opposition to Motion to Dismiss Complaint, conceded that the affidavit of Barish alone would not supply probable cause of an arrest.

Thus, the issue turns on the affidavit signed by Stutz. If that is insufficient, Barish's is not good by itself; if it is good, Barish is incorporated in it via paragraph 6. Assuming the above arguments are valid as against Stutz's affidavit, then Barish's affidavit should fall also.

In Jones v. United States, 362 U.S. 257, the court said that information received by an informer "is not deemed to be insufficient on that score, so long as a substantial basis for crediting the hearsay is present. . . . he (agent) may rely upon information received through informant . . . so long as . . . (it) is reasonably corroborated by other matters within the officer's knowledge." Jones, 271.

Jones also sets out the criteria for this substantial basis (underlying circumstances):

1. That the informer had previously given reliable information;

2. Informant's story was corroborated by other sources of information;

3. Defendant was known by the police to be in the business of which the violation is concerned. Jones, page 269.

In the existent case, point one (1) is present only with regard to paragraph 4 of Stutz's affidavit. The other two points are not alleged at all within either affidavit. It therefore, seems that the magistrate acted without probable cause in allowing the warrant to be issued.

A search warrant may be issued by a magistrate only upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property to be seized and the place to be searched.

Cal. Const. Article I, §19;

Penal Code §§ 1523, 1525;

People v. Keener (1961), 55 Cal. 2d 714,

12 Cal. Rptr. 859, 861.

"Probable cause for the issuance of a search warrant may be based on information furnished by an informant if the supporting affidavit also recites facts indicating that reliance on the information is reasonable."

People v. Keener (1961), 55 Cal. 2d 714,

12 Cal. Rptr. 859, 862;

Arata v. Superior Court, 153 Cal. App. 2d 767, 772-

773, 315 P. 2d 473;

People v. Acosta, 142 Cal. App. 2d 59, 63-64,

298 P. 2d 29.

In People v. Keener, supra, the court held that the affidavit supporting the search warrant was adequate in that it contained statements by the officer of additional facts known to him which indicated that the informant was reliable and which corroborated some of the information.

People v. Govea (1965), 235 Cal. App. 2d 347,

45 Cal. Rptr. 253, 261-262.

In Govea, the affidavit set forth numerous positive, factual allegations made from the personal knowledge of the affiant, such as: (1) the officer's knowledge that defendant was a known narcotics user; (2) the officer's rendez-vous with an operator and surveillance of a sale of narcotics; (3) the officer's hearing of a conversation concurrent with a sale of norcotics; (4) information

from an operator that a sale had been made; (5) personal knowledge of the officer, from personal surveillance that the suspects had lived on the premises searched for two months. The court found the affidavit supporting the warrant satisfactory, stating:

> "As pointed out (the affidavits) mainly consist of positive statements of Detective Walker . . . As to that portion of the affidavit relying upon information from the operator, <u>it is clear that the facts known to Walker of his own personal observations corroborated the information (of the operator)</u> . . .
>
> "Accordingly, probable cause for the issuance of a search warrant may be based on information furnished by an informant, even though not identified by name, <u>if the supporting affidavit also recites facts indicating that reliance on the information is reasonable</u>. (citations omitted). Evidence substantiating reliance by the police on such information may be of different kinds, including, <u>inter alia</u>, the personal knowledge and observations of the police officers." (Emphasis added)

<u>People v. West</u> (1965), 47 Cal. Rptr. 341, 344-345;

> "(3) The affidavit on which the warrant was issued sets forth a police officer's belief that probable cause to search exists, based on (1) information from a reliable, confidential informant that West was using, selling, and possessing narcotics at

Apartment 3 with a girl named Lou Ann; (2) registration of the utilities at Apartment 3 to Lou Ann Douglas; and (3) a record of prior narcotics convictions for West and Lou Ann Douglas.

"(4-6) Is this enough to establish probable cause: We think not. In our view the specific question is controlled by the decision of the United States Supreme Court in Aguilar v. State of Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, a case reversing a narcotics conviction in a state court because of the insufficiency of the affidavit supporting the search warrant. In Aguilar, the Supporting affidavit set forth a police officer's belief that petitioner kept narcotics for sale at a particular address, a belief based on unspecified information from a reliable informant and on unspecified observations of the premises by the police. In holding that the affidavit did not establish probable cause, the Supreme Court said that the unamplified conclusion of a reliable, confidential informant was an inadequate foundation from which to launch a search warrant. The facts supporting the informant's conclusion must be sufficiently developed in the affidavit to enable the issuing magistrate to judge for himself the persuasiveness of the information relied upon for probable cause. The affidavit in Aguilar failed to show that the police

officer or his source had any personal knowledge of the matters set forth in the affidavit. For all that appeared, said the court, the source may have merely suspected the presence of narcotics in petitioner's possession. The Supreme Court then summarized the applicable rule: 'Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see Rugendorf v. United States, 367 U. S. 528, 84 S. Ct. 825 (11 L. Ed. 2d 887), was "credible" or his information "reliable".' " (378 U. S. at 114, 84 S. Ct. at 1514.)

"Nothing in the subsequent case of United States v. Ventresca, 380 U. S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684, altered these basic requirements. Although the validity of the search warrant in question was upheld, the Supreme Court there pointed out: 'This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists

without detailing any of the "underlying circumstances" upon which that belief is based. See Aguilar v. State of Texas, supra. Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police'."
380 U.S. at 108-109, 85 S.Ct. at 746.)

"(7) Aguilar makes clear that a petition for a search warrant based solely on information from a reliable informant must set forth sufficient data in the supportinf affidavit (1) to show that the informant is in fact reliable, and (2) to disclose the source of the informant's knowledge so that the examining magistrate can himself determine whether probable cause exists for the issue of the warrant."

V

THE COMPLAINT IS DEFECTIVE IN THAT IT ATTEMPTS TO ENCOMPASS MORE THAN ONE OFFENSE IN ONE COURT

The complaint attempts to charge, or at least is not clear as to whether or not it is charging, failure to register, pay a tax, file a tax return, or any other offense outlined in 18 U.S.C. §§ 4401, 4411, 4412 and 7203.

A gambling tax information charging defendant with wilful failure to register and to file returns was defective and

objectionable as encompassing more than one offense.

Driscoll v. United States (C. A. Mass., 1966), 356 F. 2d 324.

VI

THERE IS NO CORROBORATION OF THE TESTIMONY OF ROBERT FREEDMAN; NO STATEMENT THAT MR. PARENTI "RECEIVED OR ACCEPTED" WAGERS, BUT ONLY THAT WAGERS COULD BE "PLACED" BY CALLING A CERTAIN NUMBER

VII

DISTINCTION BETWEEN §§ 7201 AND 7203 OF TITLE 26 OF U. S. C. A.

The legislative history behind the enactment of §7201 sheds light upon its meaning and its purpose above and beyond §7203.

"Any person who wilfully attempts in any manner to evade or defeat any tax . . . shall be guilty of a felony." 26 U. S. C. A. §7201.

"Any person required under this title to pay any estimated tax or tax, . . . who wilfully fails to pay such estimated tax or tax, . . . shall, in addition to other penalties provided by law, be guilty of a misdemeanor." 26 U. S. C. A. §7203.

Section 7201 was to be in addition to §7203. The distinction which the House made was that §7201 was to apply only to the "failure to make a tax return." All other returns were still subject

only to §7203 of the Code. The Senate amended this, so that §7201 would apply to the "wilful attempt to evade or defeat any tax." The failure to file a tax return, wilful or otherwise was, and is, to be covered by §7203. This amendment was accepted and became the law as we now have it. 1954 U. S. Code., Congressional & Amd. News, pp. 4572, 5251, 5343.

Concerning the definition of "wilful" as construed by the cases, one notices that there is a distinction between the criteria for its meaning as used within §§ 7201 and 7203 of the Code. It has been said that "wilful" means more when the issue is non-payment of a tax than when the issue concerns a failure to make a return. Spies v. United States (1942), 317 U. S. C. 492. It states that if the issue were failure to make a return, "voluntary and purposeful" would suffice to show "wilful". But, this would not be enough in the former issue.

> "The difference between the two offenses . . . is found in the affirmative action implied from the term 'attempt' as used in the felony subsection. . . . We think Congress intended some wilful commissions in addition to wilful omissions." Spies at 498, 499.

From this, one sees that something more than wilful, per se, is needed. A wilful but passive neglect of statutory duty may conctitute violation under §7203, but for §7201, to be applicable, there must be a deliberate act capable of deceiving, misleading, or defeating the tax obligation and this must be intentionally employed by the defendant for tax evasion reasons.

Consequently, for a violation of §7201, there must be shown a subjective state of mind (wilful) plus affirmative activity. United States v. Jannuzzio (1960), 184 F. Supp. 460.

Further, it is stated in Brideforth v. United States (1956), 233 F.2d 451, that a "wilful omission to make a return and pay such a tax" does not violate "Wilfully and knowingly attempting to evade and defeat such tax and wages". Here, defendant filed his return, omitting this special tax, and the court held that this itself was not enough to show "wilfulness".

In conclusion, let it be said that more than a voluntary omission is necessary for defendant's acts to come within the scope of §7201. Some affirmative action must be coupled with this voluntariness. Thus, this action must be shown. The evidence failed to establish a "wilful"violation of §7201.

VIII

26 U.S.C., §4411 IS UNCONSTITUTIONAL IN THAT IT INFRINGES UPON THE PRIVILEGE AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Wagering is a statutory crime in California. California Penal Code, §337a. By forcing one to register and pay a wagering tax under Federal Statutes is to compel one to incriminate himself under state penal laws.

It is recognized that the above argument has been rejected by the United States Supreme Court in the cases of United States v.

Kahriger (1953), 345 U.S. 22, and Lewis v. United States (1955), 348 U.S. 419. However, since deciding both of those cases, the United States Supreme Court has widely expanded the scope of the Fifth Amendment privilege against self-incrimination and has granted certiorari in the case of United States v. Costello (1965), 352 F.2d 848, cert. granted 383 U.S. 942 (1966), limiting its review to the issue of self-incrimination.

In the Kahriger and Lewis cases, the United States Supreme Court reasoned that the statute does not require registration of incriminating information; purchasing the tax stamps is a condition precedent to doing business as a gambler, so registration is only required as to prospective acts; the privilege against self-incrimination protects against the revelation only of past acts which are incrimatory.

This statutory interpretation has been sharply criticized. See, e.g., Lewis v. United States (1955), 419, 423-425, (Black, J., dissenting); United States v. Kahriger (1953), 345 U.S. 22, 36-37 (Black, J., dissenting); Blake, Self-Incrimination, Registration Statutes and George Washington's Cherry Tree, 23 L. in Trans. 197 (1963); Note, Constitutional Law - Federal Gambling Tax - Self-Incrimination, 29 N.Y.U.L. Rev. 217 (1954). It has been suggested with some force that the statute is not wholly prospective but that the registrant has incriminated himself the moment he registers. The language of the statute, which requires registration of any person who is engaged in the business of gambling, seems to support this argument. Mr. Justice Black has

characterized the registration form (Special Tax Return and Application for Registry, form 11-C) as a "written confession that (the registrant) is at the moment he registers 'engaged in the business of accepting wagers.' " Lewis v. United States (1955), 348 U.S. 419, 424 (Black J., dissenting). See also Blake, supra note 12 at 08-13. At least two states, Alabama and Tennessee, have been sufficiently impressed by this reasoning that they have made possession of the federal wagering tax stamp prima facie evidence of violation of state gambling laws. Ala. Code title 14, 7 302 (8)-(10) (1953); in Tennessee the State Supreme Court upheld a similar city ordinance in Deitch v. City of Chattanooga (1953), 195 Tenn. 245 258 S. W. 2d 776.

Even if the statute requires information only of prospective acts, it has been argued that the information required would be sufficient to convict the registrant of conspiracy to gamble in violation of state law. This argument is based on the requirement that the registrant fill out a form which calls for, inter alia, the names and addresses of all those engaged in the business of accepting wagers for the registrant.

At least one case has upheld a conviction of conspiracy to gamble from possession of the federal wagering stamp. Acklen v. State (1954), 196 Tenn. 314, 267 S. W. 2d 101. Or at least supply a link in the chain of evidence needed to convict. Compelled information which supplies the authorities with a "link" or "lead" has long been protected by the privilege against self-incrimination. E. g., Hoffman v. United States (1951), 341 U. S. 479; Blau v.

United States (1950), 340 U. S. 159; Counselman v. Hitchcock (1892), 142 U. S. 547. It might even be aruged that the mere fact that the individual is required to register and thus single himself out from the general public is a "link" or a "lead" in itself, without considering the added information the authorities receive from the registration form. These arguments raise serious doubts as to the validity of the Supreme Court's decisions in Kahriger and Lewis.

Recently these cases were put in further doubt by Albertson v. Subversive Activities Control Board (1965), 382 U. S. 70, which involved a statute requiring registration of all members of the Communist Party. 64 Stat. 987-1006 (1950), 50 U. S. C. 781-798 (1951). The Supreme Court held that the statute was unconstitutional because the pervasive effect of the information call for is . . . incriminatory, 382 U. S. 79. The court distinguished this information from the questions on the ordinary income tax registration which are neutral on their face and directed at the public at large. The income tax was upheld in United States v. Sullivan (1927), 274 U. S. 259. In contrast, the communist registration statute was directed at a highly selective group inherently suspect of criminal activities, 382 U. S. at 79, and involved an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of the crime. The analogy to the Costello situation is clear. Gambling is an area permeated with criminal statutes; gamblers are a highly selective group inherently

suspect of criminal activity. Therefore, the pervasive effect of the wagering tax statute is incriminatory. Albertson creates considerable pressure for holding the wagering statute unconstitutional and over-ruling both Kahriger and Lewis. Although Albertson did not mention either the Kahriger or Lewis cases, it is clear that the situations are analogous and the Albertson reasoning is apposite. In granting certiorari in Costello, the Supreme Court recognized this analogy when it asked whether Kahriger and Lewis should be over-ruled in light of Malloy v. Hogan (1964), 378 U.S. 1, Murphy v. Waterfront Com. of New York Harbor (1964), 378 U.S. 52, and Albertson.

CONCLUSION

Wherefore, appellant respectfully prays that the conviction be reversed.

Respectfully submitted,

PAUL CARUSO

Attorney for appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Paul Caruso
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